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FEDERAL COMMUNICATIONS COMMISSION  
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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Telecommunications Services )  
Inside Wiring )

Customer Premises Equipment )

In the Matter of )

Implementation of the Cable )  
Television Consumer Protection )  
and Competition Act of 1992: )

Cable Home Wiring )

CS Docket No. 95-184

MM Docket No. 92-260

REPLY COMMENTS OF THE  
INFORMATION TECHNOLOGY INDUSTRY COUNCIL

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## **SUMMARY**

The Information Technology Industry Council ("ITI") has historically been a vocal advocate of policies intended to promote competition in multichannel video service provider ("MVPD") service and product markets, and it therefore generally supports adoption of the rules the Commission proposed in the Further Notice of Proposed Rulemaking ("Further Notice") in these proceedings. A few modifications to those proposals would, however, improve the efficacy of the rules.

First, ITI agrees with other commenters that the Commission should not set a default price for an incumbent MVPD's sale of inside home run wiring or home wiring, but should leave the task of reaching a price to the parties' private negotiations. If the parties fail to agree on a price within a prescribed time period, the price should be determined through a binding, impartial appraisal.

Second, ITI supports the Commission's proposal to require MVPDs that install inside wiring in new MDUs to transfer ownership of the wiring to the MDU owners, and ITI supports the approach recommended by Ameritech New Media, whereby the consideration for the transfer would be a non-exclusive agreement by the MDU owner to grant access to the building to the installing MVPD for a defined time to give the MVPD the opportunity to recover its investment.

ITI agrees with the commenters that have advocated a requirement that incumbent MVPDs with a legal right to occupy space in MDU conduit and molding share space with other MVPDs for fair rental value if adequate space is available. ITI also concurs in the comments by many parties that safeguards are

necessary to protect the interests of MDU tenants in selecting their own MVPD as against landlords and MDU owners that have financial incentives to select the MVPD that will serve a building.

ITI echoes the comments of other parties who have said that the Commission should move the cable demarcation point, or at least move it when it is physically inaccessible. ITI supports the definition of “physically inaccessible” that the Media Access Project and the Consumer Federation of America have proposed.

ITI strongly opposes the recommendation by some that incumbent MVPDs should be given the right to halt procedures for the disposition of their inside wiring merely by claiming that the procedures are violating their rights under state or local law. The right to raise such a challenge exists whether or not the Commission expressly recognizes it; but the Commission would be inviting anticompetitive delay tactics by incumbent MVPDs if it articulated a right to stop the procedures merely by *claiming* that the disposition procedures infringe a state or local right.

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**REPLY COMMENTS OF THE  
INFORMATION TECHNOLOGY INDUSTRY COUNCIL**

The Information Technology Industry Council ("ITI") submits these Reply Comments to the comments filed in response to the Further Notice of Proposed Rulemaking ("Further Notice") in the captioned proceedings.<sup>1</sup>

**INTRODUCTION**

ITI is the leading trade association of manufacturers and vendors of computers, consumer electronics, computing, and information products and services. The members of ITI operate in briskly competitive markets that have fostered the introduction of countless innovative products, furthered technological progress, and benefited consumers. ITI submitted Comments in

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<sup>1</sup> *Telecommunications Services Inside Wiring -- Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS Dkt. No. 95-184 and MM Dkt. No. 92-260, FCC 97-304 (released August 28, 1997).

response to the Notice of Proposed Rulemaking in CS Docket No. 95-184,<sup>2</sup> and incorporates those Comments herein by reference. In these Reply Comments, ITI responds to arguments and proposals that have been advanced by commenters on the Further Notice.

ITI commends the Commission on its continuing encouragement of competition in the provision of multichannel video service provider ("MVPD") services and customer premises equipment ("CPE") used in conjunction with those services. The Commission's efforts here and in other proceedings to transform historically non-competitive markets for MVPD products and services promise to bring enormous benefits to consumers in the form of more competitive prices, a wider variety of sophisticated goods and services, and a broader selection of service providers and vendors. ITI therefore generally supports adoption of the Commission's proposals regarding relocation of the demarcation point and disposition of home run wiring and home wiring in multiple dwelling units ("MDUs"), with the modifications explained below.

I. THE COMMISSION SHOULD MODIFY CERTAIN OF ITS PROPOSALS AND ADOPT THOSE PROPOSALS AS MODIFIED.

As noted above, ITI generally supports the pro-competitive proposals of the Commission, but respectfully submits that the competitive benefits and legal underpinnings of certain proposals would be enhanced by targeted modification of the proposals prior to adoption.

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<sup>2</sup> Comments of the Information Technology Industry Council in CS Dkt. No. 95-184 (filed March 18, 1996).

- A. The Commission should not involve itself with setting the purchase price for an incumbent MVPD's inside wiring.

In the Further Notice, the Commission has proposed a series of procedural steps that an MDU owner, the incumbent MVPD, and subscribers must take to effectuate the disposition of the incumbent's home run wiring and home wiring upon termination of the incumbent's service agreement with the MDU. It has also proposed rules providing for the disposition of inside wiring when some residents of an MDU decide to replace an incumbent's video services with services provided by an alternative MVPD.<sup>3</sup>

The Commission has solicited comment on the appropriate price for an MDU owner or alternative MVPD to pay to purchase an incumbent MVPD's home run wiring, if either of them elects to do so.<sup>4</sup> With respect to *home* wiring, the Commission has also proposed to apply the pricing rule contained in Section 76.802(a) of its Rules<sup>5</sup> (for single-dwelling units) to the sale of an incumbent MVPD's home wire to MDU subscribers, owners, and alternative MVPDs.<sup>6</sup> Under Section 76.802(a), the purchase price for the home wiring is equal to the per-foot replacement cost of the wiring.

The Commission should not adopt the replacement cost standard of Section 76.802(a) or any other across-the-board price or pricing methodology

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<sup>3</sup> Further Notice at ¶¶ 35-40, 76-82.

<sup>4</sup> Further Notice at ¶¶ 37-38, 40.

<sup>5</sup> 47 C.F.R. § 76.802.

<sup>6</sup> Further Notice at ¶¶ 77, 81 & notes 180, 191.

that would apply to all MVPDs, such as one of the default pricing schemes proposed by a number of commenters.<sup>7</sup>

For both home wiring and home run wiring, the Commission should allow private negotiations to establish the purchase price, with binding appraisals as a backstop measure if negotiations reach an impasse. When the incumbent MVPD and the prospective purchaser agree to enter into negotiations for the sale of the wiring, they will be deemed to have agreed to consummate the sale, either at the negotiated price or at the price calculated by neutral appraisers. This approach would increase fairness, sharply reduce the degree of government interference with market forces, minimize the opportunity for anticompetitive conduct, and address legal and constitutional concerns such as those voice by many of the commenters.<sup>8</sup>

- B. The Commission should adopt safeguards to protect MDU residents' interests from self-serving actions of MDU owners and landlords.

The initial comments on the Further Notice demonstrated remarkably widespread agreement on the need to safeguard MDU residents against self-

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<sup>7</sup> See Ameritech Comments at 5; Leaco Comments at 4; Comments of Philips Electronics North America Corporation and Thomson Consumer Electronics, Inc. ("P&T") at 17-18; Comments of the Cable Telecommunications Association ("CTA") at 11-13; Comments of Telecommunications, Inc. ("TCI") (filed September 25, 1997) at 17-19.

<sup>8</sup> See ICTA Comments at 6-7; Further Joint Comments of Building Owners and Managers Association International, Institute of Real Estate Management, International Council of Shopping Centers, National Apartment Association, National Multi Housing Council, and National Realty Committee ("Joint MDU Commenters") (filed September 25, 1997) at 8-9; Comments of GTE Service Corporation ("GTE") (filed September 25, 1997) at 10-11; Comments of Time Warner Cable ("Time Warner") at 41-45 (setting default pricing for inside wiring is unconstitutional taking without just compensation).



serving MDU owners and landlords.<sup>9</sup> ITI generally agrees with the commenters that have proposed safeguards..

- C. The Commission should require MVPDs to transfer newly installed inside wiring to owners of new MDUs, but the rules should protect the installing MVPD's opportunity to recoup its costs without impeding competition by alternative MVPDs.

The Commission should adopt a modified version of its proposal prospectively to require MVPDs that install inside wiring in new MDUs to transfer ownership of that wiring to the MDU owner.<sup>10</sup> Although this proposal has merit,<sup>11</sup> it involves the Commission to an unnecessary degree in the interaction of natural market forces.<sup>12</sup> Moreover, it may constitute an exercise of the Commission's jurisdiction which may be beyond the agency's statutory authority,<sup>13</sup> and potentially spawn constitutional challenges under the takings clause of the fifth amendment, as some commenters have already observed.<sup>14</sup>

The better approach is that proposed by Ameritech New Media, Inc. ("Ameritech"). Ameritech proposes that MDU owners obtain ownership of inside wiring installed after introduction of the proposed rules. As consideration, the service provider that installed the wiring would receive a non-exclusive right to

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<sup>9</sup> See, e.g., Time Warner Comments at 8-13; P&T Comments at 9; CTA Comments at 14-15; MAP & CFA Comments at 8-14; US West Comments at 8-9.

<sup>10</sup> Further Notice at ¶ 85.

<sup>11</sup> Accord, Comments of DirecTV at 16-17.

<sup>12</sup> Accord, GTE Comments at 17-20; Comments of Heartland Wireless Communications, Inc. ("Heartland") at 7.

<sup>13</sup> Comments of Jones Intercable, *et al.* (filed September 25, 1997) at 17.

<sup>14</sup> See Comments of the National Cable Television Association ("NCTA") at 26-27.

provide service in the MDU for a guaranteed period, allowing the MVPD the opportunity to recover its wiring costs and earn a reasonable return on its investment. If during this period the MDU owner granted exclusive rights over the wiring to another MPVD, the successor MPVD would be required to reimburse the incumbent provider for 100% of its installation costs.<sup>15</sup>

- D. Incumbent MVPDs should be required to share available space in molding and conduits in exchange for reasonable compensation.

ITI endorses the proposals of the Commission, the Media Access Project and Consumer Federation of America ("MAP & CFA"), and others that incumbent MVPDs that own or otherwise have an enforceable right to occupy molding and/or conduits in an MDU should be required to share space in such molding and/or conduits with an alternative MVPD, provided that space is available for both providers' wiring to co-exist without interfering with one another.<sup>16</sup> Disputes over the availability of adequate space would be resolved by the MDU owner; claims by an incumbent that co-locating with an alternative provider would create interference would have to be substantiated to the MDU owner's satisfaction.

Adoption of such rules would make it easier for competing MVPDs to operate within a single MDU by relieving them of the need to install redundant and unnecessary molding and conduit. It would also remove important

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<sup>15</sup> Comments of Ameritech New Media, Inc., at 8-10. ITI believes that a more appropriate measure of compensation in this case would be for the successor MVPD to reimburse the incumbent for its *unrecovered* expenses (labor and materials) incurred in installing the wiring. The incumbent MVPD might also have a claim against the MDU owner for its lost profits under a breach-of-contract theory.

<sup>16</sup> Further Notice at ¶ 83.

disincentives for MDU owners and management that might otherwise prevent them from allowing entry to competing MVPDs, since it would lessen the work required to install redundant wiring and thus lessen the disruption to MDU residents and the possibility of damage to MDU common areas.

- E. The Commission should redefine the cable demarcation point, or, at a minimum, move physically inaccessible cable demarcation points.

ITI joins the many other commenters who have urged the Commission to adopt rules that would define the demarcation point as the junction between individual home run wiring and the common wire in an MDU.<sup>17</sup> This proposal will be more effective in encouraging unit-by-unit competition than the proposed rules. First, it will encourage facilities-based competition between MVPDs by lowering a competing provider's cost of access to an MDU in which an incumbent provider is already operating. Second, it will effectively address many concerns building owners have about the disruption and damage that might arise as a result of allowing multiple providers to wire their MDUs.

Barring adoption of this proposal, ITI believes that the FCC should adopt rules that move the demarcation point when it is physically inaccessible. It is clear from many comments that the Commission has received that the costs and complications associated with accessing a demarcation point embedded in a wall or floor represent a significant hurdle to competition.<sup>18</sup> Gaining access to such

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<sup>17</sup> Further Notice at ¶ 12, n. 30; *see also* ICTA Comments at 2; P&T Comments at 4.

<sup>18</sup> Comments of the Media Access Project and Consumer Federation of America ("MAP & CFA") at 19-20; WCA Comments at 14.

demarcation points can substantially raise the wiring costs incurred by MVPDs. MDU owners and managers are also understandably reluctant to allow entry by new MVPDs where accessing demarcation points may result in significant disruption and damage and create dangerous conditions in common areas.

By providing for the movement of the demarcation point in such situations, the Commission can substantially address these concerns. For example, the costs and disruption associated with wiring an individual unit would be substantially reduced by moving the demarcation point to the junction between a unit's home run wiring and the building's common wire when access would otherwise require an MVPD to cut into a wall. By addressing the practical issue of demarcation point access, the Commission could favorably influence the efficacy of the proposed rules.

Assuming the Commission adopts this proposed rule, it should exercise care in defining when a demarcation point is physically inaccessible. ITI advocates adoption of MAP's & CFA's proposed definition of physical inaccessibility, which provides that the demarcation point is inaccessible when accessing it would: (i) require modification of or damage to preexisting structural elements in an MDU, and (ii) add significantly to the difficulty or cost of accessing home wiring in an individual unit.<sup>19</sup> This definition should provide a relatively easy guideline for determining when the demarcation point should be moved

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<sup>19</sup> MAP & CFA Comments at 20. Philips and Thomson also propose a definition of "physically inaccessible" as where gaining access would cause modification or damage to existing construction within an MDU. P&T Comments at 15.

while preserving the general distinction between home wiring and home run wiring when the demarcation point between them is accessible.

**II. THE COMMISSION SHOULD NOT GRANT INCUMBENT MVPDs THE EXPRESS RIGHT TO HALT DISPOSITION PROCEDURES IMMEDIATELY AND UNILATERALLY BY CLAIMING INTERFERENCE WITH THEIR RIGHTS UNDER STATE OR LOCAL LAW.**

ITI strongly opposes the proposal by a few commenters that the Commission give incumbent MVPDs the express, unilateral right to suspend the procedures and timetable for disposition of their inside wiring merely by providing notice that they believe the procedures interfere with their rights under state or local contract, property, or other laws or regulations.<sup>20</sup> As proposed, the Commission's rules would be held in abeyance with regard to the objecting MVPD until its claims are resolved, including all appeals.

Such a proposal invites anticompetitive abuses by incumbent MVPDs and therefore clearly conflicts with achievement of federal objectives, as expressed in Section 16(d) of the 1992 Cable Television Consumer Protection and Competition Act ("1992 Cable Act"),<sup>21</sup> codified at Section 624(i) of the Communications Act.<sup>22</sup> Moreover, MVPDs do not need an express Commission-granted right to pursue judicial relief from application of the Commission's rules. Even if the Commission determines that its rules in this area should preempt

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<sup>20</sup> . *E.g.*, TCI Comments at 12-14; Comments of Jones Intercable, et al. at 12; NCTA Comments at 14-21.

<sup>21</sup> Pub. L. No. 102-385, 106 Stat. 1460 (1992), *codified at* 47 U.S.C. §§ 521, *et seq.* (1992).

<sup>22</sup> 47 U.S.C. § 624(i).

inconsistent state and local laws -- which it has clearly stated it is disinclined to do<sup>23</sup> -- incumbent MVPDs would still have the right to seek judicial review of the rules and other relief, including a stay.

An express, unqualified right to halt the disposition procedures would encourage incumbent MVPDs to invoke the right even where little support exists for their claim and to take their time prosecuting their case, thereby indefinitely denying subscribers access to competing providers. In contrast, the absence of such an express right would provide an incentive for incumbent MVPDs to assess the merits of their claims carefully before incurring the expense of seeking judicial intervention, since a court would not stay the rules unless the complaining MVPD successfully persuaded it that its claim warranted relief. Without an express right to halt the rules immediately by merely giving notice, incumbent MVPDs would have a strong incentive to diligently pursue their claims in court because disposition procedures would continue until they were completed or a court blocked them.<sup>24</sup> This result would clearly benefit competing MVPDs as well as their prospective subscribers.

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<sup>23</sup> Further Notice at ¶ 34.

<sup>24</sup> ITI supports the Commission's and certain commenters' proposal that MVPDs should be penalized for failure to cooperate in good faith with the procedures. *E.g.*, Ameritech Comments at 5; Comments of the Consumer Electronics Manufacturers Association at 14.

## CONCLUSION

For the reasons set forth above, ITI supports adoption of the specified proposals and urges the Commission to modify those proposals in the manner described above.

Respectfully submitted,

**INFORMATION TECHNOLOGY  
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October 6, 1997

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## Certificate of Service

I, Suzanne Takata certify that true and correct copies of the preceding Reply Comments of the Information Technology Industry Council in CS Docket 95-184 and MM Docket 92-260 were served this 6<sup>th</sup> day of October, 1997 via hand delivery to the following:

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